Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSE CRUZ-ARROYO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The First Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an indictment is constructively amended, in violation of the defendant's Fifth Amendment right to a grand jury presentment, by the introduction of evidence not discovered until after the indictment is issued, where the government argued that this evidence established the defendant's guilt, and the jury specifically identified this evidence as the basis for its guilty verdicts?

II. Whether the Hobbs Act's "effect on interstate commerce" element can be satisfied by extortionate monies paid through local money orders indirectly related to a local corporate bank account used to manage and subsequently buy a local hospital that purchases equipment and supplies from local vendors who purchase these items through interstate commerce?

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The published opinion of the United States Court of Appeals, First Circuit, is contained in the Appendix (hereinafter "App.") at pages 1-16.

JURISDICTION

The judgment to be reviewed was entered on August 24, 2006. App. 1-16. Mr. Cruz-Arroyo's Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on September 20, 2006. App. 42-3. Jurisdiction is conferred on this Court by Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of Article I, section 8, of the United States Constitution:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States. . . .

The Grand Jury Clause of the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

The Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The Indictment

Jose Geraldo Cruz-Arroyo and others were charged in a six count indictment issued by a District of Puerto Rico grand jury on October 25, 2001. App. 17-39. Cruz-Arroyo was charged with conspiracy to interfere with commerce by extortion (Hobbs Act) in violation of 18 U.S.C. section 1951(a) and 2 (Count 1), App. 21-32, interference with commerce by extortion in violation of 18 U.S.C. section 1951 and 2 (Count 2), App. 32-3, conspiracy to money launder by concealing the proceeds of specified unlawful activity (Hobbs Act violations) in violation of 18 U.S.C. section 1956(h) (Count 3), App. 33-6, and conspiracy to money launder by conducting financial transactions with property used to conduct/facilitate extortion, with intent to promote and conceal the proceeds of that offense, in violation of 18 U.S.C. section 1956(h) (Count 4). App. 36.

The charges arose from the transfer of the administration and ownership of the Dr. Alejandro Otero Lopez Hospital ("Hospital") in Manati, Puerto Rico, by the Government Development Bank ("GDB"), as administered by the Department of Health ("DOH"), to Caribbean Anesthesia Services, Inc. ("CAS"). App. 22-3. Defendants Jose De Jesus-Toro, Alvin Ramirez Ortiz, and Jose Ivan Ramos Cubano were the owners and shareholders of Caribbean Anesthesia Services, Inc. ("CAS") and CAS Management,

Inc. ("CASM"). App. 19. Defendant Edison Misla Aldarondo was successively a representative, the Vice President, and the President in the Puerto Rico House of Representatives. App. 19-20. Unindicted co-conspirator Freddy Valentin Acevedo was a Senator in the Puerto Rico Senate. App. 20. Petitioner Cruz-Arroyo was the Director of the Legal Division of the Puerto Rico Department of Health and principal legal advisor of the Secretary of Health of Puerto Rico. App. 20-1.

Count 1 alleged generally that, from 1995 until the October 25, 2001, return of the indictment, the defendants conspired such that De Jesus-Toro, Ortiz, and Cubano were wrongfully induced by fear of economic harm and/or under color of official right to obtain monies for Acevedo and co-defendants Aldarondo and Cruz-Arroyo. App. 21. The object of the conspiracy was described as Aldarondo, Cruz-Arroyo, and Acevedo demanding monies for using, or promising to use, their position within the Puerto Rico government to assist the CAS codefendants in obtaining the management contract and purchase of the Hospital. App. 22.

As overt acts, Count 1 generally described the partnership of De Jesus-Toro, Ortiz, and Cubano for the purpose of obtaining a management contract for, and purchasing, the Hospital. App. 22. They sought to make the necessary political contacts to obtain the approval and endorsements for their intended purchase. App. 23. To this end, it was alleged that these defendants made contact with Acevedo, and later with Aldarondo and Cruz-Arroyo. App. 23-5. They also learned that another group of doctors backed by a high ranking government official was competing for the same contract. App. 23.

It was alleged that in mid-1997, the CAS defendants contracted with Acevedo to assist in obtaining the management contract. App. 25. The CAS defendants agreed to make payments to Aldarondo and Cruz-Arroyo in exchange for their assistance in procuring the management contract. *Id.* The remaining overt acts of Count 1 alleged various payments by the CAS defendants to the Puerto Rican officials during the course of, and subsequent to, their negotiations for the management contract for, and subsequently the purchase of, the Hospital. These included:

> Para. 19: Cubano's issuance of two $3,000 checks, between June and July, 1997, to Acevedo as payment for his help in the negotiations, App. 25;
>
> Para. 25: Cubano's payment of approximately $5,000 on September 11, 1997, to Aldarondo for his help in obtaining the administration contract, App. 26;
>
> Paras. 32-34: Cubano's receipt of a check for $100,000 from De Jesus-Toro and Ortiz on August 12, 1998, which he deposited in an account he controlled from which he issued five checks totaling $48,700 which he converted to cash and delivered to Aldarondo, App. 28;
>
> Paras. 35-38: Cubano's receipt of a check for $137,500 from De Jesus-Toro and Ortiz which he deposited in an account he controlled upon which he issued a check for $37,500 which he deposited in a personal account, from which he issued three other checks totaling $29,200 which he had cashed and the proceeds delivered to Aldarondo, App. 28-9;

> Paras. 49-50: On September 1, 2000, De Jesus-Toro and Ortiz leased an Audi A-6 worth $50,000 with monthly payments of $893.00 for the personal use of Cruz-Arroyo, and paid the gasoline and all related expenses from September 1, 2000, through the return of the indictment, App. 30-1.
>
> Paras. 54-55: In early 2001 and June 2001, De Jesus-Toro and Ortiz sought employment for Cruz-Arroyo with the management agent for the Hospital now owned and run by CAS and a connected law firm for the monthly salary of $12,000. App. 31-2.

None of the overt acts concerned a single payment of, or a group of payments totaling, $35,000 as reflected in the jury's verdict. App. 40.

Count 2, the substantive Hobbs Act charge, incorporated the 24 introductory paragraphs of the indictment, as well as the 55 paragraphs alleging overt acts in Count 1. App. 32. It alleged that Cruz-Arroyo and his four codefendants unlawfully obtained $258,548.40 the procurement of which was wrongfully induced by fear of economic harm and under color of official right.

Count 3 alleged a conspiracy to commit concealment money laundering of the proceeds of extortion by the payments of Cubano, De Jesus-Toro, and Ortiz to Aldarondo and Cruz-Arroyo, in consideration for their help in the purchase of the Hospital, and by various indirect payments to Cruz-Arroyo including the lease of his personal car and paying him a salary while he worked for the management agent of the Hospital. App. 34-35. As overt acts, Count 3 incorporated the allegations of paragraphs 1-55 of Count 1. App. 35-6.

Count 4 alleged a separate conspiracy to money launder by conducting financial transactions with property used to conduct/facilitate extortion, with the intent to promote and conceal the proceeds of that offense, between January, 1998, and the return of the indictment. App. 36. It also incorporated the 24 introductory paragraphs of the indictment and paragraphs 1-55 alleging the overt acts in Count 1. App. 36.

B. The Evidence At Trial

The court of appeals recited the evidence at trial in a light most favorable to the government. In the context of legislation allowing the privatization of Puerto Rico-owned hospitals, CAS sought to take over the management of, and purchase, the Hospital. App. 2. There were many good reasons for the DOH and GDB to support CAS's efforts not the least of which was the mismanagement of CHC, the Hospital's then current administrator, and the debt CHC had amassed to the DOH. CAS sought to avail itself of the law's provision for direct purchase by a financially sound investor already managing a particular hospital. *Id.*

As a necessary step toward obtaining the DOH's approval, the CAS defendants met with Cruz-Arroyo, chief legal advisor to the Secretary of Health and the Director of DOH's legal department. App. 2-3. Cruz-Arroyo agreed to help. App. 3.

Two potential problems threatened to interfere with CAS's efforts. First, there were other groups interested in purchasing the Hospital. App. 3. Second, a question arose as to whether CAS, in its effort to take over management of the Hospital, would be responsible for CHC's substantial debt to the DOH. *Id.* In October, 1997, DOH approved

CAS's proposed acquisition of the management contract and gave it until June 30, 1998, in which to negotiate terms for a direct sale of the Hospital. *Id.*

On November 25, 1997, codefendant De Jesus-Toro wired $15,000 from a CAS account to Cruz-Arroyo's bank account. App. 3. On January 10, 1998, Cruz-Arroyo instructed his bank to return the money because it did not belong to him. *Id.* Several days later, De Jesus-Toro issued and cashed a $35,000 check from a CAS account. With the proceeds he purchased 14 money orders, each in the amount of $2,500. App. 3-4. These money orders ultimately were traced to Cruz-Arroyo who used them for a variety of personal purposes including buying an automobile, paying for his children's private schooling, and adding to a retirement account held by him and his wife. App. 4.

In June, 1998, CAS sent a letter of intent to purchase the Hospital to the GDB and the DOH. App. 4. Although the privatization committee accepted CAS as a suitable purchaser, an auditor's report indicated that the dispute concerning CHC's debt had persisted. *Id.* Consequently, a meeting was conducted between the GDB, the DOH, the Governor's Chief of Staff, other political leaders, and CAS. *Id.* As a result of this meeting, Cruz-Arroyo was requested to draft a legal opinion to resolve the debt issue. *Id.*

In an initial opinion, Cruz-Arroyo concluded that CAS was responsible for the debt owed the DOH by the predecessor administrator, CHC. App. 4. A short time later, a revised opinion was circulated concluding that CAS was not responsible for the debt CHC had amassed. This opinion was accepted by the GDB, the DOH, the Governor's Chief of Staff, and the privatization committee making CAS eligible to purchase the Hospital. *Id.* The

parties closed on the sale three days later, though they left open to negotiation financial matters related to CAS's earlier management of the Hospital. *Id.*

In the summer of 2000, while the DOH was negotiating with CAS over the debt issue, Cruz-Arroyo entered negotiations with Jose Quiros, a 20% equity holder of CASM for an in-house counsel position at Quiros' company, Pinnacle. App. 5. Cruz-Arroyo sought an annual salary of $144,000, an automobile, a retirement plan, health benefits, and other perquisites of employment. *Id.* In August, De Jesus-Toro leased an Audi for Cruz-Arroyo's use and provided Cruz-Arroyo a gasoline credit card. *Id.* Subsequently, on October 6, 2000, Quiros offered Cruz-Arroyo the position at Pinnacle. *Id.* Cruz-Arroyo commenced his employment in January, 2001. *Id.*

C. The Appeal

Mr. Cruz-Arroyo was found guilty on all counts as charged. App. 5-6. On appeal, he urged that the evidence was legally insufficient to sustain his Hobbs Act convictions. He argued that the government failed to establish the necessary *quid pro quo* between the payments to, and benefits conferred upon, him and the acts he undertook to facilitate CAS's purchase of the Hospital. App. 6-9. He also claimed that the evidence failed to prove the requisite effect upon interstate commerce. App. 11-12. Because these convictions were predicates for the money laundering convictions, he argued those were unsupported also. Finally, Cruz-Arroyo claimed an impermissible constructive amendment of the indictment based on the jury's determination in its verdict interrogatory that he was accountable only for $35,000 of extorted and/or laundered

monies, the evidence for which was never presented to, or contemplated by, the grand jury. App. 14.

The First Circuit Court of Appeals rejected all of Cruz-Arroyo's arguments. It held, *inter alia*, that because the money Cruz-Arroyo accepted from De Jesus-Toro could be traced to a CAS account, and the Hospital bought equipment from the United States mainland, a sufficient nexus to interstate commerce had been established. App. 12. Regarding the constructive amendment argument, the court held that the jury's verdict interrogatory was not "a conclusive indication that the money orders constituted the only evidence from which the jury found him guilty." App. 14. Because it found that Cruz-Arroyo had "fair warning of the nature of the charges he faced," the court held that his Grand Jury Clause rights had not been violated. App. 15-16.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT COURT OF APPEALS, BY SANCTIONING A PROSECUTION AND CONVICTION CLEARLY BASED UPON MATTERS NEVER PRESENTED TO THE GRAND JURY, HAS RENDERED A DECISION UPON A CRUCIAL FEDERAL QUESTION THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT PROHIBITING THE CONSTRUCTIVE AMENDMENT OF AN INDICTMENT BY THE GOVERNMENT OR THE COURT.

Foremost, Cruz-Arroyo's prosecution was politically charged. It implicated the highest echelons of political life in Puerto Rico including the President of the Puerto Rico House of Representatives, a Senator and President of the

Appointments Committee of the Puerto Rico Senate, and the Puerto Rico Department of Health. In this context, the Fifth Amendment Grand Jury Clause's protection from malicious, oppressive, and unfounded prosecution must be at its zenith. Failing this vision, the First Circuit's opinion, which sanctioned the government's constructive amendment of Cruz-Arroyo's indictment, threatens to strip citizens of this basic and essential protection.

This Court explained the significance of the Grand Jury Clause in ***Wood v. Georgia***, 370 U.S. 375 (1962):

> Historically, (the grand jury) has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill-will.

Id. at 390. In ***Branzburg v. Hayes***, 408 U.S. 665 (1972), the Court again highlighted the importance of the Grand Jury in our criminal justice system:

> The adoption of the grand jury in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an institution of justice. ***Costello v. United States***, 350 U.S. 359, 362 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the majority of states.

Id. at 687-8. While courts often focus upon the other of the grand jury's twin aims, investigating crime and determining

whether there is probable cause to believe that a crime has been committed, the protective function is "no less important. . . ." ***United States v. Mechanic***, 475 U.S. 66, 73 (1986) (O'Connor, Brennan, and Blackman, J.J., concurring).

The manner in which the Grand Jury exercises its protective role is to not indict:

> In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts. Moreover, "[the] grand jury is not bound to indict in every case where a conviction can be obtained." ***United States v. Ciambrone***, 601 F.2d 616, 629 (2nd Cir. 1979) (Friendly, J., dissenting).

Vasquez v. United States, 474 U.S. 254, 263 (1986). Judge Friendly's quoted dissent drew from the views of another distinguished jurist:

> By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.

United States v. Cox, 352 F.2d 167, 189-90 (5th Cir. 1965) (Wisdom, J., concurring specially).

To effectuate this bulwark against biased on unfounded prosecution, this Court has strictly prohibited the government or a court from broadening charges by amending an indictment. Only the grand jury may broaden or

alter the charges in the indictment. As this Court stated in ***Stirone v. United States***, 361 U.S. 212 (1960), also in the context of a Hobbs Act prosecution:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a devise or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Id. at 218 (footnote omitted). Quoting Justice Miller's opinion in ***Ex Parte Bain***, 121 U.S. 1 (1887), this Court further explained:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

Id. at 216 (quoting ***Ex Parte Bain*** at 10).

This Court quoted the balance of Justice Miller's warning in ***Russell v. United States***, 369 U.S. 749 (1962):

> Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or

> control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.

Id. at 771 (quoting ***Ex Parte Bain***, 121 U.S. at 13).

In the instant case, the district court effectively amended the indictment by allowing the jury to consider, and convict upon, evidence that Cruz-Arroyo received $35,000, the proceeds of 14 money orders purchased by De Jesus-Toro and traced to Cruz-Arroyo. App. 3-4. The government procured these money orders by issuing a subpoena duces tecum on August 28, 2002, long after the indictment was returned. App. 14. Cruz-Arroyo moved to exclude this evidence at trial because it was never presented to, and was not encompassed within the charge made by, the grand jury. App. 40-2. The district court denied this motion.

To support its Hobbs Act and money laundering charges, the government alleged that Cruz-Arroyo and his co-defendants received various payments and financial remuneration totaling hundreds of thousands of dollars in exchange for their political acts and influence in facilitating CAS's purchase of the Hospital. App. 25-33. It produced evidence that, in addition to the $35,000 in money orders, Cruz-Arroyo received substantial compensation and employment benefits from the persons and entities that benefitted from his official acts. App. 5, 10, 15. But the jury in its verdict interrogatory stated that Cruz-Arroyo

was only accountable for $35,000 as a result of his extortion and money laundering. App. 45.

Contrary to the First Circuit's opinion, the jury's answer to the interrogatory conclusively demonstrated that it had rejected the government's allegations of Cruz-Arroyo's complicity in an extortion and money laundering scheme involving hundreds of thousands of dollars, and its proof regarding the monies it claimed he extorted and laundered in the indictment. The jury's finding was essential to determine Cruz-Arroyo's offense level for sentencing purposes. Because submission of Cruz-Arroyo's case to the jury postdated ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), but pre-dated ***United States v. Booker***, 543 U.S. 220 (2005), the issue regarding the value of the monies extorted or laundered, which had the potential of being the most significant factor impacting Cruz-Arroyo's sentence, *see* U.S.S.G. §§ 2B1.1(b)(1), 2C1.1(b)(2), 2S1.1, had to be submitted to the jury. The district court's sentencing of Cruz-Arroyo would be based on the jury's determination. *See* ***Blakely v. Washington***, 542 U.S. 296, 301, 303 (2004); ***Apprendi*** at 490. To now hold that the jury's finding limiting Cruz-Arroyo's accountability for extortion and money laundering to $35,000 does not reflect its determination of the full scope of his criminal conduct would utterly disregard the sentencing scheme of ***Apprendi*** and ***Blakely***.

The jury based its guilty verdicts exclusively upon the extortion and money laundering established by the post-indictment evidence of the money orders Cruz-Arroyo received. The court's jury charge, which, for instance, in Count 2 alleged without limitation extortion in the amount of $258,548.40, App. 43-4, had the effect of expanding the scope of the indictment so as to allow conviction based on Cruz-Arroyo's receipt of the money order proceeds never

contemplated by the grand jury. This constituted a constructive amendment and violated the Grand Jury Clause.

In its effort to salvage Cruz-Arroyo's conviction, the First Circuit avoided this Court's prohibition against the government or a court amending an indictment by characterizing the government's mid-stream change of horses as a mere "variance:"

> A variance occurs "when the facts proved at trial differ from those alleged in the indictment. Even if a variance occurs, however, that fact alone does not suffice to displace a conviction. Rather, a variance requires that a conviction be set aside only when it is prejudicial, that is, when it affects the defendant's substantial rights. There is no prejudicial variance so long as an indictment provides the defendant with sufficient detail to allow him to prepare a defense, avoid unfair surprise at trial, and plead double jeopardy when appropriate.

App. 15 (citation omitted).

Based on this incomplete framework, the court noted that the "indictment limned the nucleus of operative facts giving rise to the charges against the appellant" listing not only "some overt acts referable to the charged conspiracies . . . but also referr[ing] to the general agreement among CAS's shareholders that De Jesus-Toro would take care of the payments to [the appellant]." App. 15. From this, the court readily concluded that, "[t]aken in the ensemble, these allegations served to put the appellant on notice that any pecuniary benefit he had received from or through De Jesus-Toro might be relevant to the government's case" and that "the indictment gave the appellant fair warning as to

the nature of the charges that he faced and allowed him to defend intelligently against those charges." App. 15-16.

The First Circuit's failure to acknowledge the "protective function" of the grand jury flies in the face of this Court's above cited precedents. Perhaps best illustrative is this Court's decision in ***Stirone***. There, the defendant was also charged with a Hobbs Act violation. It was alleged that he used his influential position in the union to affect, by extortion, the victim's interstate movement of "supplies and materials (sand)" to his Pennsylvania plant for use in making ready-mixed concrete for the erection of a steel-processing plant elsewhere in Pennsylvania. *Id.*, 361 U.S. at 213-14. Over objection, the district judge allowed the government to introduce evidence not only of sand imported into Pennsylvania from other states, but also of interference with steel shipments from the steel plant in Pennsylvania to other states. *Id.* at 214. The court, over the defendant's objection, charged the jury that the defendant's guilt could be based either on a finding that the sand used to make the concrete moved in interstate commerce or that the articles that would be manufactured by the steel plant would move in interstate commerce. *Id.*

Relying heavily upon ***Ex Parte Bain***, this Court declared that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Id.* at 217. The Court observed that the indictment could not be fairly read to charge interference with movements of steel; the indictment reflected that the grand jury was satisfied only to charge that the defendant's conduct interfered with the interstate movement of sand. *Id.* Given the dual bases for the charge before the

petit jury, this Court noted "it cannot be said with certainty" that the jury's finding of guilt was grounded in the charge made by the grand jury. *Id.*

The Court repeated that it could not "know whether the grand jury would have included in its indictment a charge that commerce in steel from a non-existent steel mill had been interfered with." *Id.* at 219. Emphasizing the importance of the grand jury's protective function, the Court held:

> While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

Id. at 217. Nowhere did the Court suggest that absent a failure of notice, the determination of the grand jury of upon what charge a defendant should be charged is superfluous or unimportant. *Cf.* ***Schmuck v. United States***, 489 U.S. 705, 717-18 (1989) (rule that defendant cannot be held to answer a charge not contained in the indictment based "at least in part" on right of defendant to notice of the charge).

The decision of the court of appeals in ***United States v. Randall***, 171 F.3d 195 (4th Cir. 1999), *cert. denied*, 531 U.S. 906 (2000), highlights the errant path of the First Circuit in ***Cruz-Arroyo***. There, in an analysis emphasizing the protective function of the grand jury, the court vacated the defendants' convictions based on an impermissible constructive amendment of the indictment. The

defendants were charged with, *inter alia*, use or carrying a firearm on the date of their arrest, during and in relation to a drug trafficking crime, specifically *distribution* of a controlled substance. *Id.* at 198, 201. The trial evidence detailed a series of controlled buys of crack cocaine by an undercover detective, including one during which one defendant pointed the firearm at the detective. *Id.* at 199. On the date of the defendants' arrests, shortly after the detective was supposed to, but did not, take delivery of an ounce of crack, the gun was found under the seat of the vehicle the defendants were driving nearby other drugs and distribution paraphernalia. *Id.* at 200.

The government urged in summation that the jury should convict the defendants based on their possession of the firearm and the other drugs in the car that were ready for distribution. *Id.* at 201-02. The court instructed the jury that it could convict the defendants if it found that they used or carried the firearm in relation to a drug trafficking crime and defined a drug trafficking crime as one involving the possession with intent to distribute, or distribution, of any controlled substance. *Id.* at 202.

Analyzing the defendants' constructive amendment claim, the court declared that the Fifth Amendment guaranteed that a criminal defendant will be tried "only on charges in a grand jury indictment" and that "only the grand jury may broaden or alter the charges in the indictment." *Id.* at 203. It explained:

> When the government, through its presentation of evidence *and/or* its argument, *or* the district court, through its instructions to the jury, *or* both, broadens the basis for conviction beyond those charged in the indictment, a constructive amendment – sometimes referred to as a fatal

> variance – occurs. . . . A constructive amendment is a fatal variance because the indictment is altered "to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." . . . Thus, a constructive amendment violates the Fifth Amendment right to be indicted by a grand jury, is error *per se*, and must be corrected on appeal even when the defendant did not preserve the issue by objection.

Id. (citations omitted).

In finding a constructive amendment, the court noted that, though the government was not required to specify a predicate offense for its using and carrying a firearm charge, it did so by alleging distribution of a controlled substance. *Id.* at 208. The court analogized this to the indictment in ***Stirone*** in which the government specified that interstate commerce was burdened by the movement of sand. The evidence and instructions that combined to allow the jury to convict on a different basis, that interstate commerce was burdened by the exportation of steel, effected the constructive amendment. *Id.*

The court found that like ***Stirone***, though the government was not required to specify the predicate offense upon which it was relying, because it did, "it was not allowed through the presentation of its evidence and its argument, and the district court was not allowed through its jury instructions, to broaden the basis of conviction. . . . " *Id.* at 210. Thus, because these acts resulted in an impermissible constructive amendment, the defendants' convictions had to be reversed.

The First Circuit's opinion in ***Cruz-Arroyo*** clashes irreconcilably with this Court's general jurisprudence

regarding the grand jury's protective function and the issue of constructive amendment, and most specifically with this Court's decision in ***Stirone***. Contrary to this deeply entrenched doctrine, the First Circuit has turned its back on the crucial "protective function" of the Grand Jury Clause. It has effectively stripped citizens of the grand jury's vital safeguard against biased and unfounded prosecutions. In no case is the importance of this protection as great as here where the allegations were politically charged and the jury clearly registered its rejection of the majority of the government's proof by holding Cruz-Arroyo only accountable for $35,000. But the grand jury never contemplated an extortion scheme or money laundering involving these monies. As pointed out in ***Randall***, the presentation of such evidence can impermissibly broaden the charges and result in a constructive amendment.

The First Circuit's opinion in Cruz-Arroyo, limiting the Grand Jury Clause's function to ensuring a defendant's notice of the allegations and ability to plead double jeopardy, and tacitly disclaiming the independent protective function of the grand jury, merely followed its own precedents. *E.g.*, ***United States v. Dubon-Otero***, 292 F.3d 1, 5-6 (1st Cir.), *cert. denied*, 537 U.S. 1171 (2003); ***United States v. Marrero-Ortiz***, 160 F.3d 768, 773 (1st Cir. 1998); ***United States v. Tormoz-Vega***, 959 F.2d 1103, 1115 (1st Cir.), *cert. denied sub nom.*, ***Boscio v. United States***, 506 U.S. 866 (1992). The other circuit courts of appeals appear similarly to have severed the protective function thread of this Court's Grand Jury Clause jurisprudence. *See, e.g.*, ***United States v. Wozniak***, 126 F.3d 105, 109-11 (2nd Cir. 1997) (reversing due to constructive amendment but only because defendant had inadequate notice of charges); ***United States v. Mikolojczyk***, 137 F.3d 237, 243 (5th Cir.),

cert. denied sub nom., ***Koehler v. United States***, 525 U.S. 909 (1998); ***United States v. Folks***, 236 F.3d 384, 390-2 (7th Cir.), *cert. denied*, 534 U.S. 830 (2001); ***United States v. Novak***, 217 F.3d 566, 574 (8th Cir.), *cert. denied*, 531 U.S. 1043 (2000). *See generally* ***United States v. Navarro-Vargas***, 408 F.3d 1184, 1211-12 (9th Cir.) (*en banc*) (Hawkins, J., dissenting) (majority opinion setting out lengthy history of grand jury and Grand Jury Clause and dissenters recognizing grand jury's "protective role"), *cert. denied*, 126 S.Ct. 736 (2005).

Besides weakening the fabric of the Grand Jury Clause, the First Circuit's opinion, like those of the other circuit courts of appeals cited *supra*, confuses the doctrine this Court has adhered to since ***Ex Parte Bain*** in 1887. To correct the errant path of the First Circuit and the other circuit courts of appeals, and to fortify the critical protection that the Grand Jury Clause guarantees all citizens, this Court should review this case and reverse Mr. Cruz-Arroyo's conviction.

II. THE FIRST CIRCUIT COURT OF APPEALS' OPINION, FINDING THAT CRUZ-ARROYO'S ALLEGED EXTORTIONATE CONDUCT VIOLATING THE HOBBS ACT AFFECTED INTERSTATE COMMERCE, IGNORES THIS COURT'S RECENT CASELAW LIMITING THE SCOPE OF THE INTERSTATE COMMERCE CLAUSE AND CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS FINDING THE AFFECTS OF CERTAIN CRIMES ON COMMERCE TOO ATTENUATED.

In a recent trilogy of cases, this Court has identified significant limitations on Congress' regulatory authority

under the Commerce Clause. In ***United States v. Lopez***, 514 U.S. 549 (1995), this Court invalidated the Gun Free School Zones Act, 18 U.S.C. section 922(q) (1988), which made it a federal crime to possess a firearm within 1000 feet of a school. In finding Congress' authority under the Commerce Clause not limitless, this Court emphasized

> that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Id. at 557 (quoting ***Jones & Laughlin Steel Corp.***, 301 U.S. 1, 37 (1937)).

By its decision upholding Cruz-Arroyo's conviction on the two Hobbs Act counts, the First Circuit Court of Appeals has failed to heed this Court's warning in ***Lopez***. Even viewing the evidence in the light most favorable to the government, the evidence indicating De Jesus-Toro's purchase of local money orders and transfer of them to Cruz-Arroyo failed to establish "a de minimus interference with commerce." App. 11. The First Circuit's opinion makes clear that this money did not come *directly* from a CAS account. App. 3-4. It indicates that De Jesus-Toro purchased the money orders personally. Cruz-Arroyo then used the proceeds of these money orders for personal, local matters including making a down payment on a car, paying for his children's private schooling, and adding to a retirement account. App. 4.

To bridge the interstate commerce gap, the First Circuit asserted that because "the Hospital bought much of its equipment from the United States mainland" and the "payments depleted CAS's assets," this adequately demonstrated an affect upon interstate commerce. App. 4. To rest Cruz-Arroyo's convictions upon this assertion of an indirect and attenuated nexus to interstate commerce violates the limitations emphasized in ***Lopez*** and reinvites a regime in which no local matter would be beyond Congress' Commerce Clause authority. The First Circuit's conclusion also conflicts unavoidably with decisions from several other circuit courts of appeals to this effect.

In ***Lopez***, this Court identified "the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce," as one of the "three broad categories of activity that Congress may regulate under its commerce power." *Id.*, 514 U.S. at 558-9. This Court then looked at a variety of factors to determine whether the knowing possession of a firearm in a school zone fell into this category of lawful regulation. These included whether the statute had anything "to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms," *id.* at 561, whether the statute contained any "express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce," *id.* at 562, whether the statute or its legislative history contained any "express congressional findings regarding the effects upon interstate commerce," *id.*, and the strength of the link between the proscribed conduct and the proffered effect on interstate commerce. *Id.* at 563-7.

The government had argued that because possession of guns leads to violent crime, there is an effect on interstate commerce by the mechanism of insurance (by which the societal costs of crime are spread), a reduction in the willingness of individuals to travel from state to state, and the negative effect upon national productivity caused by the threat of guns to the educational process. *Id.* This Court held that such arguments prove too much because under them, Congress could "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564.

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to pause at any activity by an individual that Congress is without power to regulate.

Id. In ***A.L.A. Schecter Poultry Corp. v. United States***, 295 U.S. 495 (1935), Justice Cardozo, concurring, expressed a similar sentiment: "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. . . . Activities local in their immediacy do not become interstate and national because of distant repercussions." *Id.* at 554.

This Court has applied the analysis of ***Lopez*** in at least two subsequent cases to strike down laws presumably authorized under the Commerce Clause. In ***United States v. Morrison***, 529 U.S. 598 (2000), this Court struck down a provision of the Violence Against Women Act of 1994 that established a civil remedy for victims of crimes of violence motivated by gender. *Id.* at 606-7. Despite specific legislative findings that gender-motivated violence had a substantial effect upon interstate commerce, *id.* at 614-15, this Court rejected those findings for the same reasons it found the proffered nexus between the Gun-Free School Zones Act and interstate commerce in ***Lopez*** too attenuated. *Id.* This Court observed that the concern it expressed in ***Lopez***, that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority, seemed "well founded." *Id.*

In a more analogous context, in ***Jones v. United States***, 529 U.S. 848 (2000), this Court struck down Title 18, U.S.C. section 844(i), which made it a crime to damage or destroy, "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The criminal act involved the defendant throwing a Molotov cocktail through a window into a private home that was severely damaged by the ensuing fire. *Id.* at 851. The statute contained the "jurisdictional element" identified in ***Lopez*** that otherwise would have reflected a legitimate exercise of authority under the Commerce Clause. The government argued that the victim's property was "used" in activities affecting commerce because his home was used (1) as collateral for an out-of-state mortgage; (2) to obtain casualty insurance from an out-of-state insurer;

and (3) to receive natural gas from out-of-state sources. *Id.* at 855.

This Court rejected the state's far-reaching arguments construing the word "use" narrowly to avoid the constitutional dilemma. The Court explained:

> Were we to adopt the Government's expansive interpretation of section 844(1), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.

Id. at 857 (citations omitted).

The First Circuit's opinion is inconsistent with the line this Court drew in ***Lopez*** and applied in ***Morrison*** and ***Jones***. Although the Hobbs Act certainly has a jurisdictional element that limits its reach to a specific sub-set of extortion offenses that have a connection with, or affect on, interstate commerce, the evidence presented by the government failed to satisfy this element. The link between De Jesus-Toro's payments to Cruz-Arroyo and interstate commerce was simply too indirect and attenuated to satisfy the Hobbs Act jurisdictional element. As in ***Lopez***, ***Morrison*** and ***Jones***, to allow the Hobbs Act to reach the wholly local matter that the government proved at trial would be to obliterate the critical distinction between those interstate matters Congress appropriately legislates under the Commerce Clause and those intrastate matters that, under our dual system of government, are strictly reserved to local sovereigns.

The First Circuit's opinion conflicts with decisions of other federal circuit courts of appeals that have applied the limits explained in ***Lopez***. In ***United States v. Mattson***, 671 F.2d 1020 (7th Cir. 1982), the defendants were convicted of a Hobbs Act extortion conspiracy based on their roles in attempting to bribe municipal officials to secure an electrician's license for an electrician who was advised his application would be blocked and that he needed an "edge." *Id.* at 1022. The defendants exploited a variety of personal connections and ultimately obtained $3,000 from the electrician to assist in securing the license. *Id.* at 1022-3. In the end, the electrician never received the license.

In this pre-***Lopez*** case, the court acknowledged that the Hobbs Act was construed to effectuate "all the constitutional power Congress ha[d] to punish interference with interstate commerce by extortion. . . . " *Id.* at 1023 (quoting ***Stirone***, 361 U.S. at 215). It identified two categories of Hobbs Act prosecutions, those establishing a "direct connection between extortion and interstate commerce" and others establishing only an indirect effect, so called "depletion-of-assets" cases, where the assets of an entity that "is actively engaged in interstate commerce or customarily purchases items in interstate commerce" has its assets depleted. *Id.* at 1023-4. Although the court emphasized that the effect on interstate commerce need only be "de minimus," "the effect still must be more than a speculative, attenuated 'one step removed' kind of effect." *Id.* at 1024 (citation omitted).

The court held that the extorted payments came from the electrician's personal assets, not the company for which he worked. It was not shown that he was conducting a business engaged in, or purchasing items from, interstate

commerce. *Id.* at 1024-5. It held that the victim "was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce." *Id.* at 1025. This, the court held, was an inadequate nexus to satisfy the Hobbs Act jurisdictional requirement.

In ***United States v. Wang***, 222 F.3d 234 (6th Cir. 2000), the court reversed the defendants' Hobbs Act robbery convictions for lack of a substantial affect upon interstate commerce. The defendants robbed the victims at gunpoint in their home of $4,200.00. *Id.* at 236. This consisted of $3,000.00 that earlier had been withdrawn from a personal bank account, and $1,200.00 that came from the cash register of the victims' restaurant, most of which was intended to be deposited into the restaurant's bank account the next morning. *Id.*

The court acknowledged the low, "de minimus effect on interstate commerce," threshold for robbery prosecutions under the Hobbs Act. *Id.* at 237. It also acknowledged the obvious involvement of the restaurant, from which the money had come, in interstate commerce as well as the "depletion-of-assets" theory upon which defendants can be prosecuted where the nexus to interstate commerce is indirect. *Id.* at 238-9. But, despite the fact that the funds "belonged to a restaurant doing business in interstate commerce," *id.* at 240, where the victims were private citizens and no further nexus with interstate commerce was demonstrated, the jurisdictional element of the Hobbs Act had not been proven. *See also* ***United States v. Collins***, 40 F.3d 95 (5th Cir. 1994) (revering Hobbs Act robbery conviction based on insubstantial affect upon interstate commerce), *cert. denied*, 514 U.S. 1121 (1995); ***United States v. Blair***, 762 F.Supp. 1384 (N.D.

Cal. 1991) (granting judgment of acquittal in Hobbs Act extortion case where government failed to establish requisite affect on interstate commerce).

The First Circuit's opinion sanctions a prosecution and conviction for which the nexus to interstate commerce is simply too remote. By its strained analysis, the court elevated De Jesus-Toro's personal purchase of local money orders and act of providing them to Cruz-Arroyo, to acts of CAS. App. 11. It then relied upon the attenuated connection between CAS and interstate commerce, that the local Hospital it purchased and operated purchased equipment that was obtained from the United States mainland, to bridge the jurisdictional chasm. App. 12. It is precisely this type of indirect and attenuated effect that this Court feared would obliterate the critical distinction in our constitutional structure between matters properly regulated by national government and others strictly reserved to local sovereigns. Sustaining Cruz-Arroyo's conviction under these circumstances violated the Due Process Clause. *See* ***In re Winship***, 397 U.S. 358 (1970). To align the First Circuit's opinion in ***Cruz-Arroyo*** with this Court's Commerce Clause jurisprudence and to reconcile it with the conflicting cases of the other circuit courts of appeals, this Court should review the decision below and reverse Cruz-Arroyo's conviction.

CONCLUSION

For these reasons, Petitioner respectfully pray that this Court grant its Writ of Certiorari.

Respectfully submitted,

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461 F.3d 69

United States Court of Appeals,
First Circuit.
UNITED STATES of America, Appellee,

v.

Jose Gerardo CRUZ-ARROYO, Defendant,
Appellant.
No. 05-1681.

Heard June 7, 2006.
Decided Aug. 24, 2006.

Rafael F. Castro Lang, for appellant.

Jacqueline D. Novas, Assistant United States Attorney, with whom H.S. García, United States Attorney, and Nelson Pérez-Sosa, Assistant United States Attorney (Senior Appellate Attorney), were on brief, for appellee.

Before SELYA, LIPEZ and HOWARD, Circuit Judges.

SELYA, Circuit Judge.

Following a lengthy trial, a petit jury convicted defendant-appellant Jose Gerardo Cruz-Arroyo on four counts involving Hobbs Act extortion and related money laundering. In this venue, the appellant challenges the sufficiency of the evidence and the constitutionality of convictions based mainly on evidence neither identified in the indictment nor previewed before the grand jury. We affirm.

I. BACKGROUND

Because the appellant mounts a challenge to the sufficiency of the evidence, we rehearse the relevant facts in the light most hospitable to the verdict, consistent with

record support. *See United States v. Sánchez-Berríos*, 424 F.3d 65, 71 (1st Cir.2005).

In the 1990s, Puerto Rico began the substantive process of privatizing government-owned hospitals. *See* P.R. Laws Ann. tit. 24 §§ 3301-3325 (repealed 2003). The enabling legislation, among other things, authorized the Department of Health (the DOH) to contract out certain health-care services and to sell off public hospitals. That aspect of the legislation required the DOH, acting in concert with the Government Development Bank (the GDB), to approve each such transaction. *See id.* § 3303.

Sales of public hospitals typically had to be accomplished through competitive bidding. *See id.* If, however, a financially sound investor already was administering the affairs of a particular public hospital, the DOH could short-circuit the bidding process and negotiate directly with that investor for a sale of the hospital. *See id.* § 3306. In an effort to take advantage of the direct-sale option, Caribbean Anesthesia Services, Inc. (CAS) sought to assume an existing contract for the administration of the Dr. Alejandro Otero Lopez Hospital (the Hospital) in Manati, Puerto Rico. The contract was, at the time, held by Caribbean Hospital Corporation (CHC).

As part of a push to gain the DOH's approval for the contract assumption, a CAS consultant arranged a luncheon between CAS shareholders and the appellant, who was the chief legal adviser to the Secretary of Health (the Secretary) and the director of the DOH's law department. At this luncheon – attended on CAS's behalf by, among others, Jose De Jesus-Toro, Jose Ivan Ramos Cubano, and Alvin Ramirez Ortiz – the appellant learned of CAS's interest in taking over the Hospital's management contract

and, ultimately, in purchasing the facility outright. When the meeting ended, the appellant said that he would help CAS in whatever way he could. The CAS shareholders thereafter agreed that De Jesus-Toro would shepherd the relationship with the DOH generally and with the appellant specifically.

From that point forward, the appellant served as CAS's ears and eyes in the government, keeping De Jesus-Toro abreast of all developments. CAS soon learned of two potential snags. First, there were other groups interested in acquiring the Hospital. Second, the GDB's counsel had issued an opinion that highlighted a dispute over whether CAS would be responsible for monies owed to the DOH by its assignor (CHC). This dispute was significant both because of the size of the debt and because, under Puerto Rico law, an entity in debt to the DOH could not take advantage of the direct-sale option. *See id.* § 3306. Since the management contract had only a short time left to run, the GDB's counsel argued that the Hospital should be auctioned off through an open bidding process.

In October of 1997, the DOH overrode the GDB's objections, approved CAS's proposed acquisition of the management contract, and gave CAS until June 30, 1998 to negotiate terms for a direct sale of the Hospital. CAS took over management of the facility the next month.

On November 25, 1997, while the direct-sale negotiations were in full flower, De Jesus-Toro wired $15,000 from a CAS account to the appellant's bank account. On January 10, 1998 – more than a month later – the appellant instructed his bank to return the money because it did not belong to him. However, a mere four days thereafter, De Jesus-Toro withdrew $35,000 from a CAS account and

used the funds to procure fourteen money orders, each in the amount of $2,500. Without exception, the proceeds of these money orders found their way into the appellant's possession before the direct-sale deadline. The appellant used the funds for a variety of personal purposes (e.g., to make a down payment on a new automobile, to pay for his children's private schooling, and to augment individual retirement accounts held by him and his wife).

In June of 1998, CAS sent a letter of intent for the Hospital purchase to the GDB and the DOH. Although the privatization committee found CAS to be a suitable purchaser, an auditor's report indicated that the debt dispute had not been resolved. A meeting was arranged between the GDB, the DOH, the Governor's chief of staff, and CAS. Jose Quiros, who held a twenty percent equity interest in CAS, met with the appellant beforehand in order to present his views on the matter. When the four-way meeting occurred, the Governor's chief of staff requested that the appellant draft a legal opinion to resolve the uncertainty.

In an initial opinion, dated September 4, 1998, the appellant found that CAS was responsible for the debts amassed by its predecessor-in-interest (CHC). Shortly thereafter, the appellant did an about-face and prepared a revised opinion, dated September 14, 1998, in which he concluded that CAS was not responsible for the debts amassed by CHC. The revised opinion was accepted by the agencies involved and made CAS eligible to purchase the Hospital without the hindrance of competitive bidding. The parties closed on the direct sale three days later (although CAS and the DOH continued to debate financial issues that arose out of CAS's earlier management of the Hospital).

At the same time that the DOH was dickering with CAS over the debt issue, the appellant was negotiating *sub rosa* to become in-house counsel for Pinnacle (a company controlled by Quiros). In those negotiations, the appellant presented Pinnacle with a wish list that included a $144,000 annual salary, a luxury car, a retirement plan, health benefits, sick leave, paid vacation, and summer camp for his children. In Quiros's words, he and De Jesus-Toro "felt obliged" to hire the appellant, notwithstanding the fact that his demands far exceeded what Pinnacle had budgeted for the position.

In August of 2000, while both the appellant's employment negotiations and CAS's debt negotiations were ongoing, De Jesus-Toro leased an Audi for the appellant's use. CAS not only footed the bill but also gave the appellant the use of a gasoline credit card, free of charge.

On October 6, 2000, Pinnacle, through Quiros, formally offered the appellant the in-house counsel position. CAS and the DOH resolved their remaining financial issues the next month. The appellant started work at Pinnacle in January of 2001. The jury supportably could have found that these events were not merely coincidental but, rather, inextricably intertwined; Pinnacle managed two medical centers, including CAS's newly acquired Hospital, and these two institutions jointly paid the salaries of all Pinnacle's employees (including Pinnacle's neophyte in-house counsel).

In due course, a federal grand jury indicted the appellant and four codefendants (including De Jesus-Toro, Ramos Cubano, and Ramirez Ortiz). The indictment charged the appellant with two counts of extortion (viz., one count of conspiracy to interfere with commerce by

extortion and one count of interference with commerce by extortion) and two counts of conspiracy to commit money laundering. *See* 18 U.S.C. §§ 1951, 1956. After a forty-one day trial, a petit jury found the appellant guilty across the board. This timely appeal ensued.

II. ANALYSIS

Before us, the appellant advances three assignments of error. First, he argues that the evidence was insufficient to support the verdict on the Hobbs Act extortion charges (counts 1 and 2). Second, and relatedly, he maintains that this same dearth of evidence undermines his convictions for money laundering (counts 3 and 4) because the alleged extortion served as the underlying predicate offense on which those charges were based. Third, he posits that his convictions on all four counts must be set aside due to a fatal variance: those convictions were premised on evidence neither submitted to the grand jury nor referenced in the indictment. We address the three components of this asseverational array sequentially.

A. *Counts 1 and 2.*

We review challenges to the sufficiency of the evidence de novo, assessing the proof in the light most hospitable to the verdict. *See United States v. Vega Molina*, 407 F.3d 511, 526 (1st Cir.2005); *United States v. Valle*, 72 F.3d 210, 216 (1st Cir.1995). The test is whether the evidence, including all reasonable inferences therefrom, would permit a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of the crime charged. *See United States v. Maldonado-García*, 446 F.3d 227, 231 (1st Cir.2006). We administer the test without any

independent evaluation of the credibility of the witnesses. *See United States v. Franky-Ortiz*, 230 F.3d 405, 407 (1st Cir.2000). Finally, we caution that to achieve a passing grade on this test, the prosecution need not have succeeded in negating every possible theory consistent with the defendant's innocence. *See Maldonado-García*, 446 F.3d at 231.

The Hobbs Act criminalizes conduct that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). To support the Hobbs Act charges in this case then, the government needed to establish that the appellant committed extortion and that his actions affected interstate or international commerce. *See id.* We consider the sufficiency of the evidence as to each such element.

1. *Extortion.* The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). The indictment charged the appellant with extortion both under color of official right and through inducement by economic fear. The "color of official right" and "fear" prongs provide alternative, independently sufficient grounds for finding extortion; thus, adequate proof of one obviates any need for proof of the other. *See United States v. Bucci*, 839 F.2d 825, 827 (1st Cir.1988) (explaining that "the prosecution can establish a violation by showing that a defendant induced payment *either* through the use of . . . fear, *or* under color of official right"); *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.1976) (similar).

The appellant contends that in a Hobbs Act "color of official right" case, the government must show that the official somehow "induced" the payment. This emphasis exaggerates the government's burden. To establish guilt for extortion under color of official right, the prosecution must show only that the defendant, a public official, has received an emolument that he was not entitled to receive, with knowledge that the emolument was tendered in exchange for some official act. *See Evans v. United States*, 504 U.S. 255, 268, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992); *United States v. Cruzado-Laureano*, 404 F.3d 470, 481 (1st Cir.2005). The government is not required to prove any affirmative act of inducement on the part of the corrupt official. *See Evans*, 504 U.S. at 268, 112 S.Ct. 1881.

Here, the evidence reveals that the appellant accepted $35,000 in serial money orders derived from a CAS account. He received and spent these funds while the DOH's approval of CAS's proposal to acquire the Hospital hung in the balance. Given the appellant's pivotal role in the DOH's triage of hospital purchase proposals, the importance attached to his opinion by the Governor's chief of staff, and his resultant power to impact CAS's financial interests, the jury reasonably could have inferred that the money orders were intended as reciprocity for official acts, past or future – and that the appellant knew as much.

In an effort to blunt the force of this reasoning, the appellant suggests that these payments were simply the fruits of his "special relationship" with De Jesus-Toro. That relationship, the appellant muses, inspired De Jesus-Toro to make a generous, no-strings-attached gift. We need not dwell on the inherent implausibility of such an explanation; it suffices to say that the government need not refute every alternative theory consistent with the

defendant's innocence in order to defeat a sufficiency of the evidence challenge. *See United States v. Woodward*, 149 F.3d 46, 56 (1st Cir.1998). In this instance, the jury acted well within its proper province in rejecting the somewhat fanciful claim that the appellant received a considerable sum of money due to friendship with a man who just happened to be a beneficiary of his official acts. *Cf. United States v. Ortiz*, 966 F.2d 707, 712 (1st Cir.1992) (explaining that "jurors are neither required to divorce themselves from their common sense nor to abandon the dictates of mature experience").

We have said enough on this score. Since a plausible view of the evidence supports a finding that the appellant accepted the money orders in exchange for official acts, the proposition that the government failed to establish extortion under color of official right necessarily fails.

Although this finding, without more, establishes the extortion element, we note for the sake of completeness that the evidence also suffices to ground a finding of extortion induced through fear. We explain briefly.

Under the Hobbs Act, "fear" encompasses fear of economic loss, including the loss of business opportunities. *See Bucci*, 839 F.2d at 827. To establish that kind of fear, the government must show that the victim reasonably feared that noncompliance with the putative extortionist's terms would result in economic loss. *See United States v. Rivera Rangel*, 396 F.3d 476, 483 (1st Cir.2005). The evidence in this case satisfies that criterion.

CAS made a substantial investment when it assumed the management contract for the Hospital – and it risked forfeiting both that investment and the prospect of future profits if the DOH did not endorse its purchase proposal.

The appellant played a key role in the negotiating pavane and, thus, had the potential to influence (perhaps to dictate) the success or failure of CAS's business plan. A rational jury surely could have inferred that, given the circumstances, De Jesus-Toro and Quiros would have been apprehensive that noncompliance with the appellant's demands (such as his esurient terms for future employment at Pinnacle) would result in the foreclosure of a lucrative business opportunity. The plausibility of this inference was strengthened by Quiros's testimony that he had been considering a more experienced candidate for the Pinnacle in-house counsel position; that he had budgeted a lower wage for that post; but that he nonetheless "felt obliged" to hire the appellant at the more munificent salary that the appellant stipulated. In this regard, the jury reasonably could have thought that "fe[eling] obliged" was a euphemism for fearing the consequences of rejecting the appellant's demands.

To cinch matters, the events that transpired demonstrate beyond hope of contradiction that CAS's economic fear was reasonable. The appellant's initial opinion letter, which was unfavorable to CAS, attained the Secretary's endorsement. It was only when the appellant reversed field and revised his legal opinion (which otherwise would have barred any direct sale) that a pathway opened for CAS's acquisition of the Hospital. The timing amply illustrates the salience of this about-face: the parties closed on the sale of the Hospital a scant three days after the appellant issued his revised opinion.

We hold, therefore, that the government provided sufficient evidence for the jury to conclude that the appellant was guilty of extortion induced by fear of economic loss. *Cf. United States v. Doyle*, 981 F.2d 591, 595 (1st

Cir.1992) (warning that "[o]ne would have to believe in the Tooth Fairy to think [a particular sequence of events] merely coincidental").

2. *Commerce.* In addition to establishing extortion, the government also must show that the extortionate conduct obstructed, delayed, or affected interstate or international commerce. *See* 18 U.S.C. § 1951(a). As to this prong, the case law erects a low threshold: a de minimis interference with commerce is enough to sustain a Hobbs Act conviction. *See Vega Molina*, 407 F.3d at 527.

The appellant advances two contentions in hopes of showing that the government failed to cross even this modest threshold. Neither contention is persuasive.

The appellant's principal argument is that there was no effect on interstate commerce because the money orders that he received were purchased by De Jesus-Toro personally. Since De Jesus-Toro earned his livelihood as a physician and only practiced his profession in local hospitals, this thesis runs, an extortion of his funds could not have interfered with interstate commerce. This exercise in legal legerdemain does not withstand scrutiny.

While De Jesus-Toro bought the money orders, the record confirms that he first withdrew a sum equal to their cost – $35,000 – from a CAS account. He then used the appropriated funds to buy the money orders. Hence, the distinction between business and personal funds that the appellant relies on here is purely one of form, not of substance.

The jurisprudence of the Hobbs Act does not recognize that kind of artificial distinction. *See, e.g., United States v. Devin*, 918 F.2d 280, 293-94 (1st Cir.1990) (finding an

effect on interstate commerce when defendant had received money from the president of a corporation who, in turn, had derived the money from the coffers of the corporation – which was engaged in interstate commerce). A temporary interval of personal possession may serve to weaken the causal connection between funds and interstate commerce, but that connection remains strong enough to forge the necessary link – a de minimis effect on interstate commerce. *See id.* at 293.

The appellant's fallback argument is that the government failed to prove that any of CAS's funds entered into the stream of interstate commerce. This argument comprises little more than whistling past the graveyard. The government establishes a cognizable effect on interstate commerce if it shows that the extortionate conduct depleted the assets of a business engaged in interstate commerce. *See United States v. Rodríguez-Casiano*, 425 F.3d 12, 15 (1st Cir.2005) (upholding a finding of an effect on interstate commerce where money stolen in housebreaks belonged to businesses – a hardware store and a gas station, respectively – that purchased products out of state).

That principle is determinative in the instant case. The government adduced evidence showing that the money orders the appellant accepted could be traced to a CAS account; that CAS managed, and later owned, the Hospital; and that the Hospital bought much of its equipment from the United States mainland. This evidence formed a sufficient predicate for an inference that any payments that depleted CAS's assets affected interstate commerce.

To sum up, we conclude, without serious question, that the government provided adequate proof to establish both of the elements needed to ground convictions on the Hobbs Act counts: the commission of extortion and a concomitant interference with interstate commerce.

B. *Counts 3 and 4.*

The appellant's second claim of error stands or falls on the merits of the appellant's first claim of error. The applicable money laundering statute, 18 U.S.C. § 1956, imposes criminal liability on any person who, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity," engages in a financial transaction that constitutes money laundering. *Id.* § 1956(a)(1). In fine, the statute requires proof of the commission of some antecedent offense (the specified "unlawful activity"), the avails of which are then "laundered" by the defendant. Here, the relevant counts in the indictment (counts 3 and 4) charged the extortion as the antecedent offense.

Seizing on this tiered statutory structure, the appellant claims, in effect, that the evidence was insufficient to support a finding of extortion and that, therefore, the absence of the linchpin predicate offense rendered the evidence insufficient to support his money laundering convictions. This claim is hopeless. After all, we already have rebuffed the appellant's challenge to the sufficiency of the evidence in connection with the extortion charges. *See supra* Part II(A). Consequently, his challenge to his money laundering convictions collapses of its own weight.

C. *Variance.*

The appellant next complains that the verdict cannot stand on any of the four counts of conviction because it rests predominantly on facts that the government failed either to present to the grand jury or to plead in the indictment. We first sketch the background for this plaint and then address its merits.

In responding to a question on the verdict form, the petit jury found that the offenses of conviction involved $35,000. In the appellant's view, that calculation means that the jury found him liable only for the money orders that De Jesus-Toro passed along to him. But the government did not adduce any evidence about this alleged bribe before the grand jury; and the grand jury, in turn, did not mention the money orders in the indictment. Building on this foundation, the appellant argues that his convictions rest upon a prejudicial variance, thereby violating his rights under the Fifth, Sixth, and Fourteenth Amendments.

Though vigorously advanced, this argument lacks force. First and foremost, the fact that the jury found the appellant liable for $35,000 is by no means a conclusive indication that the money orders constituted the only evidence upon which the jury found him guilty. *See, e.g., United States v. Casas*, 425 F.3d 23, 64 n. 56 (1st Cir.2005) (stating that there is no foolproof way of telling what parts of the evidence the jury credited when it did not make specific findings on the overt acts alleged in the indictment). And even were we to assume, favorably to the appellant, the validity of his premise anent the money orders, the conclusion that he reaches would not follow.

A variance occurs "when the facts proved at trial differ from those alleged in the indictment." *United States v. Fisher*, 3 F.3d 456, 462 (1st Cir.1993). Even if a variance occurs, however, that fact alone does not suffice to displace a conviction. Rather, a variance requires that a conviction be set aside only when it is prejudicial, that is, when it affects the defendant's substantial rights. *See United States v. Tormos-Vega*, 959 F.2d 1103, 1115 (1st Cir.1992); *United States v. Fermin Castillo*, 829 F.2d 1194, 1196 (1st Cir.1987). There is no prejudicial variance so long as an indictment provides the defendant with sufficient detail to allow him to prepare a defense, avoid unfair surprise at trial, and plead double jeopardy when appropriate. *See Tormos-Vega*, 959 F.2d at 1115. The law recognizes that the government need not lay out the whole of its proof in the indictment. *See United States v. Marrero-Ortiz*, 160 F.3d 768, 773 (1st Cir.1998).

That brings us to the case at bar. Here, the indictment limned the nucleus of operative facts giving rise to the charges against the appellant. It not only listed some overt acts referable to the charged conspiracies (e.g., it described the $15,000 payment that the appellant received and returned,[1] the Audi that De Jesus-Toro leased for him, and his cushy employment arrangement with Pinnacle) but also referred to the general agreement among CAS's shareholders that "De Jesus-Toro would take care of the payments to [the appellant]." Taken in the ensemble, these

[1] The appellant insists that his return of this payment conclusively demonstrates his innocence. In view of his subsequent receipt and retention of a larger sum, however, the jury was free to conclude that his return of the $15,000 payment may have had some other, less attractive explanation (say, a belief either that the amount was too paltry or that the source of the funds was too easily traced).

allegations served to put the appellant on notice that any pecuniary benefit he had received from or through De Jesus-Toro might be relevant to the government's case. *See, e.g., United States v. Innamorati*, 996 F.2d 456, 478 (1st Cir.1993) (finding no prejudicial variance when an indictment charged a defendant with conspiring to distribute drugs and the government introduced proof of two deals not listed as overt acts because the evidence fell "squarely within the scope of th[e] alleged conspiracy").

In short, the indictment gave the appellant fair warning as to the nature of the charges that he faced and allowed him to defend intelligently against those charges. No more was exigible. Consequently, no variance (or, at the least, no prejudicial variance) occurred. *See Marrero-Ortiz*, 160 F.3d at 773.

III. CONCLUSION

We need go no further. For aught that appears, the appellant was fairly tried and justly convicted. His appeal, therefore, cannot prosper.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **(1) EDISON MISLA ALDARONDO,** **(2) JOSE GERARDO CRUZ ARROYO,** **(3) JOSE IVAN RAMOS CUBANO,** **(4) JOSE DE JESUS TORO,** **(5) ALVIN RAMIREZ ORTIZ,** **Defendants.**	**INDICTMENT** **CRIMINAL NO. 01-691(CCC)** **VIOLATIONS:** **18 USC § 1951** **18 USC § 1956(h)(a)(3)(A)(B)** **18 USC § 1512(b)(1)(2)(3)** **18 USC § 2** **SIX COUNTS**

THE GRAND JURY CHARGES:

INTRODUCTION

1. At times material to this Indictment, the Puerto Rico Department of Health (hereinafter "PRDH") was an agency of the Government of Puerto Rico created for the purpose of providing hospitals and medical services to the people of Puerto Rico.

2. At all times material to this Indictment the PRDH owned several hospitals and diagnosti treatment centers (hereinafter "CDT") throughout the island of Puerto Rico.

3. At some times material to this Indictment, PRDH began the process of considering the sale of hospitals and CDTs throughout Puerto Rico.

4. On September 5, 1996, the Puerto Rico Legislature approved Law 190, with the purpose of regulating the

process of privatizing Puerto Rico's public health facilities ("Lev [illegible] Reglamentar el Procesco de Privatización de las Instituciones de Salud Gubernament [illegible].

5. Law 190 authorizes the sale of Department of Health facilities according to appraisals conducted by the Puerto Rico Secretary of Treasury or the Department of Health of Puerto Rico.

6. On July 6, 1997, the Puerto Rico Legislature approved Law 31 which amended Law 190.

7. Law 31 had three separate purposes: First, it designated the Puerto Rico Government Development Bank as the Government's fiscal agent in the privatization process of the public health facilities of Puerto Rico. This was done in order to assist the Puerto Rico Health Department in the establishment of the sale price for the public health installations to be sold. Second, it granted those employees who had worked at the Puerto Rico public health installations for more than five (5) years, the right to continue with the benefits as established by the Puerto Rico Retirement Systems Law for an unspecified additional period of time. Lastly, Law 31 gave the Secretary of Health the prerogative of granting all the necessary permits as established by law to the entities that would assume the administration and/or purchase of the public health facilities without having to comply with all the requirements as required by previous laws and/or regulations.

8. Pursuant to Article Seven (7) of Law 31, of July 6, 1997, the private entity that at the time of the approval of said law had a contract for the management of a public health facility in Puerto Rico had the first choice or option

to purchase such health facility without having to compete in a bidding process.

9. At all times pertinent to this Indictment the Dr. Alejandro Otero Lopez Hospital was the Manati, Puerto Rico area hospital.

10. During times pertinent to this Indictment defendants José De Jesús Toro and Alvin Ramirez Ortiz were owners and shareholders of Caribbean Anesthesia Services, Inc. (hereinafter "CAS").

11. During times pertinent to this Indictment defendants, José De Jesús Toro, Alvin Ramirez Ortiz and José Ivan Ramos Cubano were owners and share holders of CAS Management, Inc. (hereinafter "CASM").

12. At all times pertinent to this Indictment, Research Sample Bank was a doing business as account at Banco Cooperativo of defendant José Ivan Ramos Cubano.

13. At all times pertinent to this Indictment, Jose Ivan Ramos Cubano held an account at Banco Cooperative de Puerto Rico under the name of Ramlord International Inc.

14. At all times pertinent to this Indictment, Jose Ivan Ramos Cubano held an account at Banco Cooperative de Puerto Rico under the name of Paradign Management International Inc.

15. At all times pertinent to this Indictment, Jose Ivan Ramos Cubano held an account at Banco Cooperative de Puerto Rico under the name of Betram Investors.

16. At all times pertinent to this Indictment defendant Edison Misla Aldarondo had an account at Banco

Popular de Puerto Rico under the name Edison Misla Aldarondo d/b/a Notigrama which he used in order to receive political donations and proceeds from his extortion activities.

17. At times pertinent to this Indictment Pinnacle Health Services, Inc. was the management agent of the Manati, Puerto Rico area hospital.

18. During times pertinent to this Indictment CAS attempted and eventually purchased the management contract of the Manati, Puerto Rico area hospital, Dr. Alejandro Otero Lopez.

19. At all times material to this Indictment, Edison Misla Aldarondo was a representative in the Puerto Rico House of Representatives.

20. From on or about 1993 through January 1997, Edison Misla Aldarondo was the Vice-President of the Puerto Rico House of Representatives.

21. From January 1997 through January 2001, Edison Misla Aldarondo was the President of the Puerto Rico House of Representatives.

22. From January 1993 through December 1996, Freddy Valentin Acevedo, was a Senator in the Puerto Rico Senate.

23. At times pertinent to this Indictment, Freddy Valentin Acevedo was the President of the Appointments Committee within the Puerto Rico Senate.

24. At times material to this indictment José Gerardo Cruz Arroyo was the Director of the Legal Division of

the Puerto Rico Department of Health and principal legal advisor of the Secretary of Health of Puerto Rico.

COUNT ONE

CONSPIRACY TO INTERFERE WITH COMMERCE BY EXTORTION INDUCED BY ECONOMIC FEAR AND/OR UNDER COLOR OF OFFICIAL RIGHT

18, *United States Code*, Section 1951 and 2

Beginning on or about 1995 and continuing through the date of the return of this Indictment in the District of Puerto Rico, and elsewhere, within the jurisdiction of this Court, the defendants herein,

(1) EDISON MISLA ALDARONDO,
(2) JOSE GERARDO CRUZ ARROYO,
(3) JOSE IVAN RAMOS CUBANO,
(4) JOSE DE JESUS TORO,
(5) ALVIN RAMIREZ ORTIZ,

and un indicted co-conspirator FREDDY VALENTIN ACEVEDO, and others known and unknown to the Grand Jury, did knowingly, intentionally, and willfully combine, conspire, confederate, and agree together and with each other to knowingly, willfully, and unlawfully obstruct, delay and/or affect commerce and the movement of articles and commodities in commerce by extortion, and to unlawfully obtain monies for defendants MISLA ALDARONDO, CRUZ ARROYO and un indicted co-conspirator VALENTIN ACEVEDO, from DE JESUS TORO, RAMIREZ ORTIZ and RAMOS CUBANO, with their consent wrongfully induced by fear of economic harm and/or under color of official right, in violation of Title 18, *United States Code*, Section 1951(a).

OBJECT OF THE CONSPIRACY

It was the purpose and object of the unlawful conspiracy that defendants MISLA ALDARONDO, and CRUZ ARROYO along with un indicted co-conspirator VALENTIN ACEVEDO, would and did demand payment of monies from DE JESUS TORO, RAMIREZ ORTIZ, and RAMOS CUBANO, in exchange for defendants MISLA ALDARONDO, CRUZ ARROYO as well as VALENTIN ACEVEDO's use, or promised use, of their position of influence within the Government of Puerto Rico in order for DE JESUS TORO, RAMIREZ ORTIZ and RAMOS CUBANO to obtain the management contract and sale of the Manati Area Hospital.

OVERACTS

1. Paragraphs one through twenty four of the Introduction, set forth above, are realleged and incorporated by reference, as though fully set forth herein.

2. In furtherance of the conspiracy and in order to effect its objects, the defendants, Misla Aldarondo, Cruz Arroyo, Ramos Cubano, De Jesus Toro, Ramirez Ortiz, and unindicted co-conspirator Valentin Acevedo, and others known and unknown to the Grand Jury, committed and caused to be committed at least one of the below enumerated over acts, among others, in the District of Puerto Rico and elsewhere.

3. In or about late 1996, Jose De Jesus Toro and Alvin Ramirez Ortiz approached Jose Ivan Ramos Cubano and proposed that they become partners in the purchase of the management contract of the Manati Area Hospital that was then under the control of a third party.

4. Defendants Jose De Jesus Toro, Alvin Ramirez Ortiz and defendant Jose Ivan Ramos Cubano agreed that De Jesus and Ramirez Ortiz would provided the necessary financial support for the purchase and Ramos Cubano would seek and obtain political contacts to facilitate the purchase.

5. Defendants De Jesus Toro, Ramirez Ortiz and Ramos Cubano also agreed that Ramos Cubano would remain as a silent partner in the venture until the hospital had been purchased.

6. At some time during late 1996 defendant Ramos Cubano sought the assistance of then senator Freddy Valentin Acevedo in order to use the political contacts that Valentin Acevedo had to obtain the necessary approval and endorsement of the mayor of Manati and the Puerto Rico Health Department for the purchase of the management contract of the Manati Area Hospital.

7. At some time during early 1997 Valentin Acevedo set up a meeting with the mayor of Manati and traveled to Manati with defendants De Jesus Toro, Ramirez Ortiz and Ramos Cubano to request the mayor's endorsement for the purchase of the Manati Area Hospital. At that meeting they learned that there was another group of doctors backed by a high ranking official within the Government of Puerto Rico competing for the same contract for the management of the Manati Area Hospital.

8. On that same day Valentin Acevedo advised defendant Ramos Cubano that in order to be successful in the bid for the contract against the other group, Ramos Cubano had to use the influence and assistance of defendant Edison Misla Aldarondo whom at the time was the President of the House of Representatives of Puerto Rico.

9. At some time in early 1997 defendant Ramos Cubano met with co-defendants De Jesus Toro and Ramirez Ortiz and proposed the idea of using the political influences of defendant Edison Misla Aldarondo. It was agreed and understood by the defendants that such influence was needed and that they were going to have to pay for Misla Aldarondo's assistance.

10. At some time during early 1997 defendant Ramos Cubano approached co-defendant Misla Aldarondo and requested his help in the purchase of the Manati Area Hospital. Defendant Misla Aldarondo agreed to help defendants in the matter with the understanding that he would have to be paid for his assistance.

11. Some time during early 1997, defendants Ramos Cubano, De Jesus Toro and Ramirez Ortiz met with co-defendant Misla Aldarondo at his office in the House of Representatives and discussed the process that had to be followed in order to purchase the Manati Area Hospital.

12. At some time in early 1997, Valentin Acevedo contacted the then Secretary of Health of Puerto Rico and advised her that he had a group of friends interested in the purchase of the administration contract for the Manati Area Hospital. Valentin Acevedo requested the Secretary's help in the matter.

13. At some time early in 1997, Valentin Acevedo contacted the chief legal advisor to the Secretary of Health, defendant Cruz Arroyo, and requested his assistance in obtaining the Health Department's approval in the sale of the administration contract for the Manati Area Hospital.

14. At sometime during the summer of 1997, defendant Ramos Cubano executed a professional services contract with Valentin Acevedo in order to pay him for his continuous help in obtaining the administration contract of the Manati Area Hospital.

15. On or about July 1997, defendants De Jesús Toro and Ramirez Cruz caused the issuance of a letter to the Secretary of Health and the President of the Government Development Bank offering to purchase the Manati Area Hospital and requesting their approval for CAS to continue negotiations with CHC towards the purchase of the management contract of the Manati Area Hospital.

16. At some time during mid 1997, co-defendants Cruz Arroyo, De Jesús Toro, Ramirez Ortiz and Ramos Cubano held a lunch meeting at Valentin's office in Santurce, Puerto Rico.

17. At said meeting the interest of defendants De Jesús Toro, Ramirez Ortiz and Ramos Cubano in purchasing the Manati Area Hospital was discussed. Defendant Cruz Arroyo agreed to help the co-defendants in their quest to purchase the Manati Area Hospital.

18. After said meeting, defendants Ramos Cubano, Ramirez Ortiz and De Jesús Toro agreed that Ramos Cubano would take care of the payments to Misla Aldarondo and De Jesús Toro would take care of the payments to Cruz Arroyo.

19. Between June and July 1997, defendant Ramos Cubano issued two $3,000.00 checks to Valentin Acevedo as payment for his help in the negotiations with the Puerto Rico Health Department.

20. On or about July 1997, defendants De Jesús Toro and Ramirez Ortiz issued a $3,000.00 check to Valentin Acevedo for his help in the negotiations with the Puerto Rico Health Department.

21. On or about August 1997, defendant Cruz Arroyo caused to be prepared and/or prepared a letter for the signature of the Secretary of Health authorizing CAS to continue negotiations with CHC for the purchase of the administration contract of the Manati Area Hospital.

22. At some time during mid 1997 defendant Misla Aldarondo contacted the president of the Puerto Rico Development Bank (hereinafter GDB) and advised him that he had a group of friends that were interested in the purchase of the Manati Area Hospital, Defendant Misla Aldarondo requested the President's assistance in obtaining the hospital.

23. Shortly thereafter, defendants De Jesús Toro, Ramirez Ortiz and Ramos Cubano agreed to ask co-defendant Misla Aldarondo for his assistance in obtaining a position as a judge for co-defendant Cruz Arroyo.

24. On or about August 1997, defendants De Jesús Toro and Ramirez Ortiz executed an Asset Purchase and Liabilities Agreement, with the consent from the Department of Health, by which the administration contract for the Manati Area Hospital was purchased for three million dollars.

25. On or about September 11, 1997, defendant Ramos Cubano gave approximately $5,000.00 to co-defendant Misla Aldarondo for his help in obtaining the administration contract for the Manati Area Hospital. Said

money was deposited in Misla Aldarondo's Notigrama account.

26. On or about September 11, 1997, defendant Misla Aldarondo issued a check from the Notigrama account payable to defendant Ramos Cubano in the amount of $2,500.00 so that defendant Ramos Cubano could convert into cash and return the cash to defendant Misla Aldarondo.

27. On or about October 22, 1997, defendant De Jesus Toro entered into a contract with the Puerto Rico Department of Health for the sale and transfer of the administration contract of the Manati Area Hospital, which was due to expire December 31, 1997.

28. On or about November 25, 1997, defendant De Jesus Toro wire transfered [sic] from his CAS, Inc. account $15,000.00 for defendant Cruz Arroyo's personal account at Banco Popular de Puerto Rico.

29. During late 1997 through September 1998, defendants De Jesús Toro, Ramirez Ortiz, and Ramos Cubano, with the assistance of co-defendants Misla Aldarondo and Cruz Arroyo, made numerous efforts to purchase the Manati Area Hospital.

30. On or about June 1998, defendant Jose De Jesús Toro submitted an offer to GDB for the purchase of the Manati Area Hospital for seventeen million dollars.

31. Between June and July 1998, defendants De Jesús Toro and Ramos Cubano executed a letter of intent with the Department of Health and GDB for the purchase of the Manati Area Hospital.

32. On or about August 12, 1998, defendant Ramos Cubano received check number 3642 for $100,000.00 from co-defendant De Jesús Toro and Ramirez Ortiz from the Hospital Dr. Alejandro Otero Lopez account.

33. On or about August 13, 1998, defendant Ramos Cubano deposited the $100,000.00 check into his d/b/a account Parading Management International Inc., at Banco Cooperativo de Puerto Rico.

34. From August 17, 1998 through August 21, 1998, defendant Ramos Cubano issued five (5) consecutive checks from his Parading Management account all in excess of $9,000.00 but less than $10,000.00 for a total of $48,700.00 and all checks were payable to cash.

All checks were converted to cash by defendant Ramos Cubano and said cash was delivered to co-defendant Misla Aldarondo.

35. On or about September 10, 1998, defendant Ramos Cubano received check number 20768 for $137,500.00 from defendants De Jesus Toro and Ramirez Ortiz from Hospital Dr. Alejandro Otero Lopez in the name of Paradign Management.

36. On or about September 11, 1998, defendant Ramos Cubano deposited the $137,500.00 check number 20768, in his Parading [sic] Management account at Banco Cooperativo.

37. On or about September 11, 1998, defendant Ramos Cubano issued a $37,500.00 check from his Paradign Management account payable to himself. Said check was deposited into a separate account at Banco Cooperativo, the account holder being defendant Ramos Cubano.

38. On or about September 11, 1998, through September 12, 1998, defendant Ramos Cubano issued three (3) checks from his Paradign Management account for more than $9,000.00 but less than $10,000.00 for a total of $29,200.00. Two of the checks were made payable to third parties and one was made payable to cash. Defendant Ramos Cubano had all three checks cashed and delivered the cash to defendant Misla Aldarondo.

39. On or about September 11, 1998 defendants De Jesus Toro and Ramirez Ortiz gave defendant Ramos Cubano five checks From the Hospital Alejandro Otero Lopez account for amount less than $10,000 which defendant Ramos Cubano caused some to be cashed and another he gave to defendant Misla Aldarondo.

40. From on or about September 14, 1998, defendant Cruz Arroyo, acting as the legal advisor for the Puerto Rico Department of Health, issued an opinion letter which recommended alternate courses of action in order for defendants De Jesus Toro, Ramirez Ortiz and Ramos Cubano to .be able to proceed with the purchase of the Manati Area Hospital.

41. On or about September 17,1998 defendants De Jesus Toro, Ramirez Ortiz and Ramos Cubano executed the purchase agreement with Puerto Rico Health Department for the sale of the Manati Area Hospital.

42. On or about October 1, 1998, defendant Ramos Cubano received check number 021916 for $15,000.00 from defendants De Jesus Toro and Ramirez Ortiz from the Hospital Dr. Alejandro Otero Lopez account in the name of Research Sample Bank.

43. On or about October 8, 1998, defendant Ramos Cabano received check number 021969 for $45,000.00 from defendants De Jesus Toro and Ramirez Ortiz from Hospital Dr. Alejandro Otero Lopez account in the name of Research Sample Bank.

44. On or about October 16, 1998, defendant Ramos Cubano deposited two checks numbers [sic] 021916 and 021969 from defendants De Jesus Toro and Ramirez Ortiz from Hospital Dr. Alejandro Otero Lopez account totaling $60,000.00 which he deposited into his Paradign doing business as account.

45. On or about October 16, 1998, defendant Ramos Cubano issued a $50,000 check from his Paradign Management account payable to himself

46. On or about October 16, 1998, defendant Ramos Cubano, followed the instructions of co-defendant Misla Aldarondo, and purchased three (3) manager's checks at Banco Cooperativo for amounts of less than $10,000.00, made payable to third parties and delivered them to defendant Misla Aldarondo.

47. On or about July 21, 2000, defendant Misla Aldarondo deposited the October 16, 1998 check number 88766 from Banco Cooperativo for $9,000.00 made payable to a third party, into his Notigrama account.

48. On or about July 24, 2000, Misla Aldarondo issued check number 2678 payable to cash from his Notigrama account for $8,450.00 which was cashed by a third party and the cash was provided to defendant Misla Aldarondo.

49. On or about September 1, 2000, defendants De Jesus Toro and Ramirez Ortiz leased an Audi A-6 license

plate EAH-932 worth $50,000.00 with monthly payments of $893.00 for the personal use of co-defendant Cruz Arroyo.

50. From on or about September 1, 2000, to the date of the return of this Indictment, defendants De Jesus Toro and Ramirez Ortiz paid for all the gasoline and car related expenses of the Audi A-6 which they leased for the personal use of Cruz Arroyo.

51. On or about December 11, 2000, defendant Misla Aldarondo deposited into his Notigrama account a $9,000.00 manager's check number 88764 from Banco Cooperativo made payable to a third party which he received from co-defendant Ramos Cubano on or about October 1998.

52. On or about December 12, 2000, defendant Misla Aldarondo caused to be deposited into his personal Banco Bilbao Vizcaya account a $8,000.00 manager's check number 88765 from Banco Cooperativo made payable to a third party which he had received from co-defendant Ramos Cubano on or about October 1998.

53. On or about December 18, 2000, defendant Misla Aldarondo issued a $9,000.00 check from the Notigrama, account made payable to cash which was cashed by a third party and the cash given to defendant Misla Aldarondo.

54. On or about early 2001, defendants De Jesus Toro and Ramirez Ortiz asked the management agent of the Manati Area Hospital to hire co-defendant Cruz Arroyo as an in-house counsel for a monthly fee of $12,000.00.

55. On or about June 2001, defendant De Jesus Toro and Ramirez Ortiz and other persons asked a law firm doing work for the Manati area hospital to hire co-defendant Cruz

Arroyo as a lawyer for a monthly fee of $12,000.00 which they would provide to the law firm. All in violation of Title 18, *United States Code*, Section 1951(a).

COUNT TWO

INTERFERENCE WITH COMMERCE BY EXTORTION INDUCED BY ECONOMIC FEAR AND UNDER COLOR OF OFFICIAL RIGHT

Title 18, United States Code, Section 1951 "The Hobbs Act"

1. Paragraphs one through twenty four of the Introductory Allegations, and paragraphs one through fifty five of Count One, are realleged and incorporated by reference herein, as though fully set forth herein.

2. From in or about approximately 1995, through on or about the date of the return of this Indictment, in the district of Puerto Rico, and within the jurisdiction of this Court,

(1) EDISON MISLA ALDARONDO,
(2) JOSE GERARDO CRUZ ARROYO,
(3) JOSE IVAN RAMOS CUBANO,
(4) JOSE DE JESUS TORO,
(5) ALVIN RAMIREZ ORTIZ,

the defendants herein, and unindicted co-conspirator VALENTIN ACEVEDO, and other persons both known and unknown to the Grand Jury, aiding and abetting each other, did knowingly, willfully, and unlawfully affect and attempt to affect commerce and the movement of articles and commodities in commerce by extortion, in that the defendants, MISLA ALDARONDO, CRUZ ARROYO, and unindicted co-conspirator VALENTIN ACEVEDO, aided

an abetted by co-defendants DE JESUS TORO, RAMIREZ ORTIZ AND RAMOS CUBANO, unlawfully obtained the amount of two hundred fifty thousand one hundred seventy three dollars and forty cents ($ 258,548.40), from DE JESUS TORO, RAMIREZ ORTIZ AND RAMOS CUBANO, with their consent wrongfully induced by fear of economic harm and under color of official right, in violation of Title 18, *United States Code*, Section 1951 and Section 2.

COUNT THREE

CONSPIRACY TO COMMIT MONEY LAUNDERING 18, United-States Code 1956(h)

1. Paragraphs one through twenty four of the Introduction, and paragraphs one through fifty five of the over acts of Count One, are realleged and incorporated by reference herein, as though fully set forth herein.

2. From in or about May, 1996, and continuing through in or about the date of the return of this Indictment, in the District of Puerto Rico, and within the jurisdiction of this Court,

(1) EDISON MISLA ALDARONDO,
(2) JOSE GERARDO CRUZ ARROYO,
(3) JOSE IVAN RAMOS CUBANO,
(4) JOSE DE JESUS TORO,
(5) ALVIN RAMIREZ ORTIZ,

the defendants herein, did knowingly, willfully, and unlawfully combine, conspire, confederate, and agree with each other and with others known and unknown to the Grand Jury, to commit offenses against the United States, in violation of Title 18, *United States Code*, Sections 1956, including:

to knowingly and willfully conduct or attempt to conduct financial transactions knowing that the proceeds involved in the financial transactions constitute the proceeds of some form of unlawful activity, knowing that the transactions were designed, in whole or in part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity, to wit: affecting interstate and foreign commerce by extortion, and unlawfully obtaining monies by consent wrongfully induced by fear of economic and/or under color of official right, in violation of Title 18, *United States Code*, Section 1951, knowing that such financial transactions were designed in whole or in part to conceal or disguise the nature, location, source, ownership and control of the proceeds of said specified unlawful activity, in violation of Title 18 *United States Code*, Section 1956(a)(1)(B)(i).

MANNER AND MEANS OF THE CONSPIRACY

The manner and means by which the conspiracy was accomplished included, among others, the following:

3. It was a part of the manner and means of the unlawful conspiracy that payments were being paid by defendants RAMOS CUBANO, DE JESUS TORO and RAMIREZ ORTIZ, to defendants MISLA ALDARONDO and CRUZ ARROYO, in consideration for their help in the sale of the Manati Area Hospital to CAS Management.

4. It was further part of the manners and means of the unlawful conspiracy that defendants DE JESUS TORO and RAMIREZ ORTIZ would transfer monies to RAMOS CUBANO's bank accounts so that he could use them to pay co-defendant MISLA ALDARONDO.

5. It was further part of the manner and means of the unlawful conspiracy, that in order to conceal and disguise the payments of these unlawful activities, these payments were made through various means, including but not limited to: payments to third parties, business entities and cashing of checks for payment to defendants MISLA ALDARONDO and CRUZ ARROYO.

6. It was further part of the manner and means of the unlawful conspiracy that defendants DE JESUS TORO and RAMIREZ ORTIZ would make indirect payments to co-defendant CRUZ ARROYO paying for the lease of his personal car, paying his salary while working for the management agent of the Manati area hospital, paying for his salary through a law firm he worked for, wire transfers and by making payments in cash.

OVER ACTS

1. Paragraphs one through twenty four of the Introduction of this Indictment, set forth above, are realleged and incorporated by reference, as though fully set forth herein.

2. In furtherance of the conspiracy and in order to effect its objects, the defendants, MISLA ALDARONDO, CRUZ ARROYO, DE JESUS TORO, RAMIREZ ORTIZ, RAMOS CUBANO and unindicted co-conspirator VALENTIN ACEVEDO, and others known and unknown to the Grand Jury, committed and caused to be committed at least one of the below enumerated overt acts, among others, in the District of Puerto Rico and elsewhere:

3. Paragraphs one through fifty five of the overt acts of Count One are hereby incorporated and realleged as

overt acts of this Count. All in violation of 18, *United States Code*, 1956(h).

COUNT FOUR

MONEY LAUNDERING
TITLE 18 UNITED STATES CODE SECTION 1956(h)

1. Paragraphs one through twenty four of the Introduction, and paragraphs one through fifty five of the over acts of Count One, are realleged and incorporated by reference herein, as though fully set forth herein.

2. Between on or about January 1998 and continuing up and until the date of the return of this Indictment the defendants herein, in the District of Puerto Rico, and elsewhere within jurisdiction of this Court, EDISON MISLA ALDARONDO, JOSE GERARDO CRUZ ARROYO, JOSE IVAN RAMOS CUBANO, JOSE DE JESUS TORO, ALVIN RAMIREZ ORTIZ, and others known and unknown to the Grand Jury did conspire, confederate and agree with others to knowingly, intentionally and willfully conduct financial transactions involving property used to conduct and/or facilitate a specified unlawful activity; to wit extortion in violation of Title 18, *United States Code*, Section 1951, with the intent to:

A) promote the carrying of the specified unlawful activity.

B) conceal or disguise the nature, location, source, ownership or control of property which was the proceeds of the specified unlawful activity.

All in violation of Title 18, *United States Code*, Section 1956(h)(a)(3)(A)(B).

COUNT FIVE

INTERFERENCE WITH COMMERCE BY EXTORTION INDUCED BY ECONOMIC FEAR AND UNDER COLOR OF OFFICIAL RIGHT
Title 18, United States Code, Section 1951
"The Hobbs Act"

Between on or about July 1997 and August 1999 in San Juan, Puerto Rico, and elsewhere within the jurisdiction of this Court the defendant herein EDISON MISLA ALDARONDO did knowingly, willfully and intentionally obstruct, delay and or affect commerce and the movement of articles and commodities in commerce by extortion and unlawfully obtain monies from unindicted co-conspirator FREDDY VALENTIN ACEVEDO, and/or the Puerto Rico House of Representatives with their consent wrongfully induced by fear of economic harm and/or under color of official right in violation of Title 18, *United States Code*, Section 1951(a).

COUNT SIX

TAMPERING WITH WITNESSES
TITLE 18, UNITED STATES CODE,
SECTION 1512(b)(1),(2),(3) and 2

Between on or about October 2001, to the date of the return of this Indictment, in San Juan, Puerto Rico, and elsewhere within the jurisdiction of this Court, the defendant herein EDISON MISLA ALDARONDO and others known and unknown to the Grand Jury aiding and abetting each other did knowingly, intentionally and willfully, corruptly attempt to persuade and/or persuade JOSE IVAN RAMOS CUBANO with the intent to influence, delay, and or prevent JOSE IVAN RAMOS CUBANO's

testimony in an official investigation being conducted by the Federal Bureau of Investigations and a Federal Grand Jury sitting in the District of Puerto Rico in reference to allegations of acts of extortion by defendant EDISON MISLA ALDARONDO and others, did attempt to, hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission of a federal offense, that is, defendant MISLA ALDARONDO did attempt to influence, delay and prevent by:

(A) Asking JOSE IVAN RAMOS CUBANO to leave the jurisdiction of this Court and move to Costa Rica for a period of time;

(B) Asking JOSE IVAN RAMOS CUBANO not to provide any truthful testimony to the investigators and/or the Grand Jury investigating this case;

(C) Advising JOSE IVAN RAMOS CUBANO that he had used all his political contacts to obstruct, interfere and impede the investigation of this case;

(D) Advising JOSE IVAN RAMOS CUBANO that if the FBI should ask him about the money he should say it was a loan.

All in violation of Title 18, *United States Code*, Section 1512 and 2.

FORFEITURE
TITLE 18, UNITED STATES CODE, SECTION 982

1. As a result of a conviction of counts three and four of this Indictment, which are incorporated herein by reference, defendants EDISON MISLA ALDARONDO,

JOSE GERARDO CRUZ ARROYO, JOSE IVAN RAMOS CUBANO, JOSE DE JESUS TORO and ALVIN RAMIREZ ORTIZ, shall forfeit to the United States all property, both real and personal involved in, constituting, derived from, or traceable to proceeds of the aforestated offenses, including but not limited to the amount of two hundred fifty thousand one hundred seventy three dollars and forty cents ($258,548.40).

2. By virtue of the involvement of the assets set forth above in violation of Title 18, *United States Code*, Section 1956, any and all interest of the defendants in the above described assets is forfeited to the United States pursuant to Title 18, *United States Code*, Section 982(a)(1) and (2).

TRUE BILL

/s/ Hilda Ortiz Guzman
FOREPERSON
DATED:
10/25/2001

GUILLERMO GIL
United States Attorney

/s/ [illegible]
Jorge E. Vega-Pacheco
Assistant U.S. Attorney
Chief, Criminal Division

/s/ R Kellogg de Jesus
Rebecca Kellogg de Jesus
Assistant U.S. Attorney
DATED: X/25/01

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, **Plaintiff**	
vs.	**Crim. No. 01-691 (CCC)**
JOSE GERARDO CRUZ ARROYO **Defendant**	

SEALED MOTION TO EXCLUDE EVIDENCE

HEREIN appears defendant Jose Gerardo Cruz Arroyo through his undersigned attorney and most respectfully prays and requests:

1. The indictment in this case was returned on October 25/01. It has not been superseded at any time afterwards.

2. On August 28/02, the government subpoenaed from Banco Popular a series of Money Orders that were purchased by Dr. De Jesus on January 14/98, and allegedly given to defendant Cruz Arroyo who subsequently utilized them to pay personal debts and purchase a vehicle. (Exh.1)

Said evidence did not form part of the governments offense conduct to obtain an indictment against defendant nor has the government superseded the indictment so as to make said evidence the foundation for the extortion alleged.

3. The government in its designation of evidence announced it's intent to present at trial against defendant

Cruz Arroyo said money orders to substantiate the charges of the indictment.

4. It is the position of defendant that said evidence should be excluded pursuant to *Stirone vs. U.S.*, 361 US 212, 214-215 (1960) which held "*that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.*" At the time the government presented it's case to the grand jury they didn't even have knowledge of the existence of the money orders so as to have said evidence form [sic] part of the offense conduct on which the grand jury based it's indictment. To permit the government to present said evidence under these circumstances constitutes an impermissible variance that violates defendant's right to be tried only on the charges presented to the grand jury. It is impossible that the grand jury that indicted defendant did so on the basis of the money orders the government now intends to present at trial. See *U.S. vs. Kelly*, 722 F.2nd 873, 878 (1st Cir., 1983) where the Court explained the Supreme Court's ruling in *Stirone* stating "*The indictment charged Stirone with obstructing interstate commerce shipments of sand from outside Pennsylvania by way of extortive threats. The District Court, over Stirone's objection, admitted evidence of his interference with steel shipments. . . . <u>These were two separate wrongful acts, one of which was not in the original indictment</u>. Allowing the evidence of interference with steel shipments clearly operated as an amendment to the indictment.*"

In the present case the receipt of the money orders constitutes a separate potential wrongful act than that charged in the indictment which could not have been contemplated because it was not even known to the grand jury nor the government at the time and cannot form the

basis of a conviction to the indictment. Therefore such evidence should be excluded.

WHEREFORE it is respectfully requested from his Hon. Court that it exclude the above mentioned evidence and all other evidence that flows from the same.

RESPECTFULLY SUBMITTED.

I hereby certify that on this same date I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following: AUSA Rebecca Kellogg.

In San Juan, Puerto Rico, this 21st day of April 2004.

/s/ [Illegible]
RAFAEL F. CASTRO LANG
USDC-PR#128505
Attorney for Defendant
PO Box 9023222
San Juan PR 00902-3222
787-723-3672 – 723-1809
Fax 787-725-4133

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case No. 01-691
JOSE GERARDO CRUZ-ARROYO,	)	
Defendant.	)	

JURY INSTRUCTIONS

BEFORE THE HONORABLE
CARMEN CONSUELO CEREZO

HATO REY, PUERTO RICO

MONDAY, AUGUST 16, 2004, 10:35 A.M.

APPEARANCES:

FOR THE PLAINTIFF: REBECCA KELLOGG-DE JESUS,
JORGE VEGA-PACHECO,
ASSISTANT U.S. ATTORNEYS

FOR THE DEFENDANT: RAFAEL CASTRO-LANG, ESQ.

COURT REPORTER: Zulma M. Ruiz, RMR
Federal Building – RM G40
150 Chardon Avenue
Hato Rey, PR 00918
(787) 772-3375

* * *

[5] The second count charges interference with commerce by extortion. This second count charges that during that same period, beginning around 1995, continuing through October 25, 2001, in Puerto Rico, Mr. Edison Misla Aldarondo and unindicted co-conspirator Freddy

Valentin Acevedo, and others known and unknown to the grand jury, aiding and abetting each other, [6] knowingly, willfully and unlawfully affected and attempted to affect commerce and the movement of articles and commodities in commerce, by extortion, in that it is alleged that Mr. Misla Aldarondo, Mr. Cruz Arroyo, and Mr. Valentin Acevedo, aided and abetted by codefendants Mr. De Jesus Toro, Mr. Ramirez and Mr. Ramos Cubano, unlawfully obtained the amount of $258,548.40 from Mr. De Jesus Toro and Mr. Ramirez and Mr. Ramos Cubano, with their consent wrongfully induced by the fear of economic harm or under color of official right. It is alleged this was done in violation of Title 18, United States Code, in its Sections 1951 and 2.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA Plaintiff vs JOSE GERARDO CRUZ-ARROYO Defendant	CRIMINAL 01-691CCC

VERDICT

We the Jury FIND the defendant, JOSE GERARDO CRUZ-ARROYO:

Guilty (Guilty/Not Guilty) as charged in COUNT ONE of the Indictment.

Guilty (Guilty/Not Guilty) as charged in COUNT TWO of the Indictment.

Guilty (Guilty/Not Guilty) as charged in COUNT THREE of the Indictment.

Guilty (Guilty/Not Guilty) as charged in COUNT FOUR of the Indictment.

ONLY IF YOU FOUND DEFENDANT GUILTY IN ANY OF THE COUNTS LISTED ABOVE, PLEASE ANSWER THE FOLLOWING QUESTION:

For what amount do you find, beyond a reasonable doubt, that defendant is accountable?

$35,000.–

SO ORDERED

At San Juan, Puerto Rico, on August 16, 2004.

/s/ [Illegible]
Foreperson's signature

United States Court of Appeals
For the First Circuit

No. 05-1681

UNITED STATES

Appellee

v.

JOSE GERARDO CRUZ-ARROYO

Defendant-Appellant

Before

Boudin, Chief Judge,
Torruella*, Selya, Lynch,
Lipez and Howard, Circuit Judges.

ORDER OF COURT
Entered: September 20, 2006

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the

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* Judge Torruella is recused and did not participate in the consideration of this matter.

petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

[cc: Rebecca Kellogg, AUSA, Jorge Vega Pacheco, AUSA, Nereida Melendez Rivera, AUSA, Nelson J. Perez-Sosa, AUSA, Jacqueline D. Novas Debien, Esq., Rafael F. Castro-Lang, Esq.]